

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 100

File Number: 5289428

BETWEEN NEW ZEALAND PUBLIC
SERVICE ASSOCIATION

First Applicant

AND PETER ROBERTSHAW,
CHARLOTTE WIN, and NEIL
RAEBURN as representatives
of all the First Applicant's
members employed by the
Respondent listed at Schedule A
to the Statement of Problem

Second Applicants

AND SECRETARY for JUSTICE

Respondent

Member of Authority: Denis Asher

Representatives: Peter Cranney & Caroline Mayston for the applicants
Alastair Sherriff & Deidre Marshall for the respondent

Investigation Meeting Wellington, 29 April 2010

Submissions Received 13 May 2011

Determination: 10 June 2011

DETERMINATION OF THE AUTHORITY: Referral of Question of Law

The Problem

[1] The applicants allege, by way of a representative case, that, in the context of limited industrial action, the respondent has effected unlawful and out of time wage deductions. The respondent denies the allegation.

The Investigation

[2] During a telephone conference call on 27 January 2010 the parties agreed to undergo mediation and, in the event the matter did not settle, an investigation on 29 April. Timelines were agreed for witness statements, an agreed statement of facts and the provision of agreed bundles of documents. As it happened, the latter two items did not eventuate.

[3] Following the 29 April investigation the applicants filed a memorandum on 7 May confirming that a determination was sought only in respect of those issues upon which they made submissions, namely:

- a. Whether wages can be deducted from employees who lawfully strike by refusing to perform some duties (but are not suspended).
- b. Whether the subsequent pay period deductions were lawful. This issue relates to whether the deductions made comply with the requirements of s. 6 (2) of the Wages Protection Act 1983 (WPA).
- c. Whether the employer was entitled to make pro-rata deductions from the bailiffs' allowance.

[4] Any other issues were withdrawn from the proceeding, although all rights to advance those matters subsequently were reserved.

[5] A draft determination dated 2 June 2010 was subsequently provided to the parties.

[6] The parties then sought an adjournment so they could attend mediation in the hope of settling matters on their own terms. Mediation took place on 22 September 2010 but was unsuccessful. The parties subsequently provided an agreed timetable for filing final submissions but, as it happened, slippage occurred.

Background

[7] The relevant facts are not in dispute.

[8] The applicants and the respondent are parties to two collective employment agreements (the Staff CEA and the Team Leaders and Managers (TLM) CEA).

[9] The former collective has a deductions clause; the latter did not. Neither allowed for deductions for partial non-performance of work.

[10] Both expired on 30 June 2009.

[11] The first applicant (the PSA) and approximately 1360 of its members employed by the respondent engaged in intermittent or partial strike action throughout New Zealand from 14 October 2009. The strike action included working to rule, overtime bans, coordinated break times and actual and random industrial action. The applicants' strike action also included refusing to perform some of their rostered duties or other duties set out in their job descriptions.

[12] In an email to the PSA dated 21 October the respondent advised, amongst other things, that it would stop the pay for the duration of their attendance of any employees participating in stop work meetings (doc B, statement in reply).

[13] As a result of industrial action on 20 November, the respondent issued a standard letter to some or all of its employees engaging in partial strike action advising them that it considered any withdrawal of duties a failure to perform normal work, that employees would therefore not be entitled to pay while taking industrial

action and that their pay would be “*docked accordingly. Your pay will be reinstated at the time you resume your normal work duties*” (unnumbered attachment to statement of problem addressed to one of the second applicants, Charlotte Win).

[14] As a result of their employees’ strike action, and operating on the basis that a refusal to perform some but not all duties would result in full pay deductions for the period concerned, the respondent deducted 33,446 hours from employees’ wages and/or allowances for what are described by the applicants as mainly “*non-stoppage industrial action*” (par 11, applicants’ submissions dated 21 February 2011).

[15] Deductions were made during both the same pay period as the strike action and in later pay periods.

[16] As the two collective agreements have now been settled strike action has ceased.

Applicants’ Position Summarised

[17] In its written submissions dated 21 February 2011, the applicants say there are three legal issues:

- a. Whether wages can be deducted from employees who lawfully strike by refusing to perform some duties but are not suspended;
- b. Whether the subsequent pay period deductions were lawful, i.e. did they comply with the requirements of the WPA, in particular s. 6 (2); and
- c. Whether the respondent was entitled to make pro-rata deductions from the bailiffs’ allowance.

[18] In respect of the first issue, the law is clear: an employer has two choices in respect of a worker who offers partial performance – to accept partial performance and pay full wages or suspend that worker under ss 87 & 88 of the Act: *Rockhouse v AG* [1998] 1 ERNZ 598, 600.

[19] Here, the respondent chose not to suspend and all deductions are therefore unlawful and must be repaid.

[20] Deductions in subsequent pay periods were not lawful because inadequate notice to the worker was given (in breach of s. 6 (3) (b) of the WPA), and – by the application of additional resources – it was practicable for the respondent to effect the deductions in the proper pay period.

[21] Deductions from the bailiffs' allowance were unlawful as the allowance is a contractual annual entitlement and there is no common law or statutory rule entitling the respondent to reduce or abate payment for lawful strike action.

Respondent's Position Summarised

[22] Amongst other things, the respondent says its position is that an employee undertaking 75% of their normal work because of strike action results in zero pay (oral submissions 29 April).

[23] The amounts taken from employees' wages in the relevant pay period were not deductions, but reductions resulting from the employee not being entitled to pay for hours he or she did not work, i.e. as no wages were payable there was no deduction.

[24] Where the amounts taken from wages occurred in a subsequent pay period the employer complied with s. 6 of the WPA. That is because recovery resulted as a result of strike action, it was not reasonably practicable to avoid making an overpayment, notice was given to employees and the overpayment was recovered within the two month timeframe.

[25] The respondent also says it is not required to pay employees for services not provided for various reasons including clause 4.4 of the Staff CEA. It provides as follows:

4.4 Deductions

4.4.1 *The Ministry shall make the appropriate deductions from any salary or wages due where an employee:*

- ...
- *is absent from work without authorisation ...*

[26] While there is no equivalent provision in the TLM CEA deductions can also be effected because of s. 6 of the WPA.

[27] Because of the methods normally used by the respondent in arranging the payment of wages to its employees it was not reasonably practicable for it to avoid making an overpayment to those taking strike action, in terms of s. 6 (3) of the WPA, i.e. they were paid normal wages for the period in which the industrial action occurred and recovery was effected in a subsequent period.

[28] Any overpayment in this regard may therefore be lawfully deducted from the employee's next pay.

[29] The law relating to employment contracts is clear and straightforward: the employer pays an employee to perform agreed tasks. It follows that a refusal to work those agreed tasks means no pay.

[30] There is no contractual or statutory basis for the applicants to claim wages for refusing to perform some agreed tasks. In fact and law the respondent is simply paying for the work properly performed.

[31] The respondent relies on s. 4 of the WPA: wages do not become "*payable*" until work is performed or some other lawful basis exists for payment, which is not the case here.

[32] The respondent forewarned the first applicant (the PSA) of her view of the law and her intention not to pay employees who refused to perform all of their duties.

[33] As a matter of fact or law an employer is not required to suspend or lock out an employee who refuses to perform their normal duties before determining not to pay for that non performance, or to recover payments for the same reason. Section 87 of the Employment Relations Act 2000 (the Act) says an employer, “... *may suspend the employment of an employee who is party to the strike*” (emphasis added).

[34] Deductions made in an employee’s fortnightly pay were specifically recorded in the respondent’s payroll kiosk as strike leave, along with conventional details of an individual’s pay including wage details, annual holidays owing, deductions for KiwiSaver, etc. All of its employees are familiar with the kiosk and the process for accessing it. Communications from the applicants’ representatives confirm its employees were on notice of the respondent’s intention to recover overpayments, and were aware when they had happened:

1. *Pay - by now you will all have seen your payslips and be aware that the MOJ has docked our pay for the strike action. This was always to be expected.*

(doc 6, Bronwyn Kingdom’s witness statement)

Discussion and Findings

[35] Three live issues remain between the parties:

- a. Whether wages can be deducted from employees who lawfully strike by refusing to perform some duties but are not suspended;
- b. Whether the subsequent pay period deductions were lawful, i.e. did they comply with the requirements of the WPA, in particular s. 6 (2); and
- c. Whether the respondent was entitled to make pro-rata deductions from the bailiffs’ allowance.

[36] In *Bickerstaff v Healthcare Hawkes Bay* [1996] 2 ERNZ 680, the then Chief Judge Goddard, in respect of s. 68 of the Employment Contracts Act 1991, quoted with approval EC68.04 in Horn *Employment Contracts*,

This section reinforces the right to take 'lawful' strike action described in s. 60. It provides that, in addition to being immune from tort or injunction actions (under s 73 or s 74), a lawfully striking defendant is not susceptible to penalty or breach of employment contract claims.

(p 688, above)

[37] The then Chief Judge went on to comment in respect of other sanctions that:

It may be that they remain unaffected. An employer may still be able to refuse to pay striking employees (even without suspending them where there is a total withdrawal of labour by them) and may dismiss them. If Miles v Wakefield Metropolitan District Council [1987] AC 539; [1987] 1 All ER 1089 (HL) is good law in New Zealand, which under the Employment Contracts Act 1991 may be subject to doubt, they are liable to be dismissed even upon a partial withdrawal of labour and to have their remuneration abated to a reasonable extent proportionate to the value of the services withdrawn. ... The underlying premise of ability to sue for damages in such situations has been rendered unreliable for New Zealand by s 68 and accordingly the right to abate at source may have been abolished as well. However, I will reserve the expression of a concluded view on the precise effect of s 68 for a case in which the point is argued. I mention it in the present context only to illustrate the robustness of the statutory recognition of the right to strike.

(ps 688 & 689 above)

[38] No argued case appears to have arisen.

[39] In *Rockhouse v A-G* [1998] 1 ERNZ 598, Chief Judge Goddard addressed the consequences of an early return to work as a result of the end of strike action. Earlier advice from management as to the time of a return to work was rescinded; the plaintiff claimed he was entitled to be paid for that earlier period. The Employment Court agreed, finding on the facts that an offer of performance in satisfaction of performance was accepted.

[40] The applicants rely on this decision and say it “*makes clear that if an employer accepts something less than full performance that is adequate performance of the employee’s obligations. The employer may suspend lawfully but did not; and cannot sue for damages*”

(because of s85 (1) (c) (i) and certainly cannot “help itself” to damages by deducting from wages” (par 23 of the applicants’ submissions dated 29 April).

[41] From the above I am satisfied that the fundamental issue (or the first and third questions) in this employment relationship problem, can an employer deduct all or some pay in respect of partial strike action, without suspending the striking employees, remains undecided.

[42] In respect of the second issue or question, I understand the respondent to be relying also on clause 4.4 of the Staff CEA to effect deductions, including those in subsequent pay periods, as well as on the decision of *Tawhiwhirangi v A-G* [1998] 1 ERNZ 571. In the latter, and after extensive evidence, the then Chief Judge Goddard held that, “*given the system in use, it was not practicable for the department to avoid the overpayment, nor was it reasonable to expect the department to have done so having regard to its wage paying methods*” (p 582).

[43] Ms Kingdom provides an explanation of the respondent’s pay system in pars 60-77 of her witness statement. In it she explains the respondent’s intranet payroll kiosk (which detailed deductions in respect of “*strike leave*”), staff access to their pay and leave details, the fortnightly pay cycle and how employees are paid nine working days in arrears and one in advance for that period.

[44] Ms Kingdom also explained how, on the Friday prior to any pay day, team leaders and managers are required to submit to payroll details of an employee’s completed hours of work. Payroll closes on the following Monday. Because of the respondent’s pay cycles, strike action results in two scenarios: first, a reduction in pay relating to the strike action because the worker’s manager is able to communicate the completed details to payroll in time for it to be processed before the next pay day. Second, the details are communicated after payroll has closed and the reduction cannot be processed in the same pay period.

[45] As was the case in *Tawhiwhirangi* (above), a large number of employees took industrial action (approximately 1415 in this instance *vis* almost 1,000 in *Tawhiwhirangi*); as noted above, 33,446 hours were lost because of industrial action.

[46] Ms Kingdom's evidence was that, because of the respondent's normal methods, it was not reasonably practicable to avoid effecting reductions over than in the same pay period.

[47] In respect of the second issue, the applicants also say that they cannot be made in a subsequent pay period unless strict conditions are met per s6 of the Wages Protection Act 1983 (the WPA). These include notice to the worker of an intention to recover (s. 6 (e) (b) of the WPA) and, by virtue of the methods normally used it was not reasonably practicable for the employer to avoid making an overpayment, (s. 6 (3) (a) of the WPA): neither of these preconditions were met. Notice was not properly served per the first precondition and extra resources could have avoided the second.

Question of Law

[48] Section 177 of the Act provides that the Authority "*may, where a question of law arises during an investigation ... refer that question ... to the court for its opinion and ... delay the investigation until it receives the court's opinion ...*"

[49] It is clear that the answer to the first issue or question is significant and extends beyond just the employees of the respondent. Because of the significance of the fundamental issue in this problem I am satisfied it represents an appropriate question of law to refer to the Court.

[50] A second important question of law arises from the first and the facts of this problem and it is, 'does the WPA envisage situations in which the employer does not suspend but is not required to pay?'

[51] By way of the same reasoning in respect of the first question, it is appropriate that I refer the third question, that of deductions in respect of the bailiffs allowance, to the Employment Court in the same way.

[52] Notwithstanding the passage of time thus far, and after full consideration of their submissions in respect of a possibility forecast in my draft determination, I am satisfied the disadvantage accruing to the parties as a result of referring these

questions to the Court is properly balanced by their importance to the parties and to others.

Determination

[53] For the reasons set out above, I refer the following questions of law to the Employment Court:

- a. Can wages be deducted from employees who lawfully strike by refusing to perform some but not all duties, but who are not suspended or locked out?
- b. Does the WPA envisage situations in which the employer does not suspend but is not required to pay? And,
- c. Arising out of the answer to the first question of law, is the respondent also entitled to make pro-rata deductions from the bailiffs allowance?

[54] As requested, costs are reserved.

Denis Asher

Member of the Employment Relations Authority